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No. 89-1049

Supreme Court, U.S.

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In The  
**Supreme Court of the United States**

October Term, 1989

**JANET M. DANESE**, Individually and as Personal Representative of **THE ESTATE OF DAVID DANESE**, Deceased; **LOUIS DANESE, SR.**, **DANIEL DANESE**, **PAMELA DANESE**, **MARGARET DANESE**, **THOMAS DANESE**, **FRANCES DANESE**, and **LOUIS DANESE**, Individually,

v.

*Petitioners.*

**THOMAS A. ASMAN**, Individually and as Chief of Police of the City of Roseville; **ROBERT PETERS**, Individually and as Inspector for the City of Roseville; **HOWARD HILL** and **FREDERICK STEIN**, Individually and as Sergeants and Shift Commanders for the City of Roseville; **STEVEN GOWSOSKI**, **ROBERT CHUCHRAN**, **DENNIS CARDINAL** and **RICHARD KENYON**, Individually and as Police Officers of the City of Roseville,

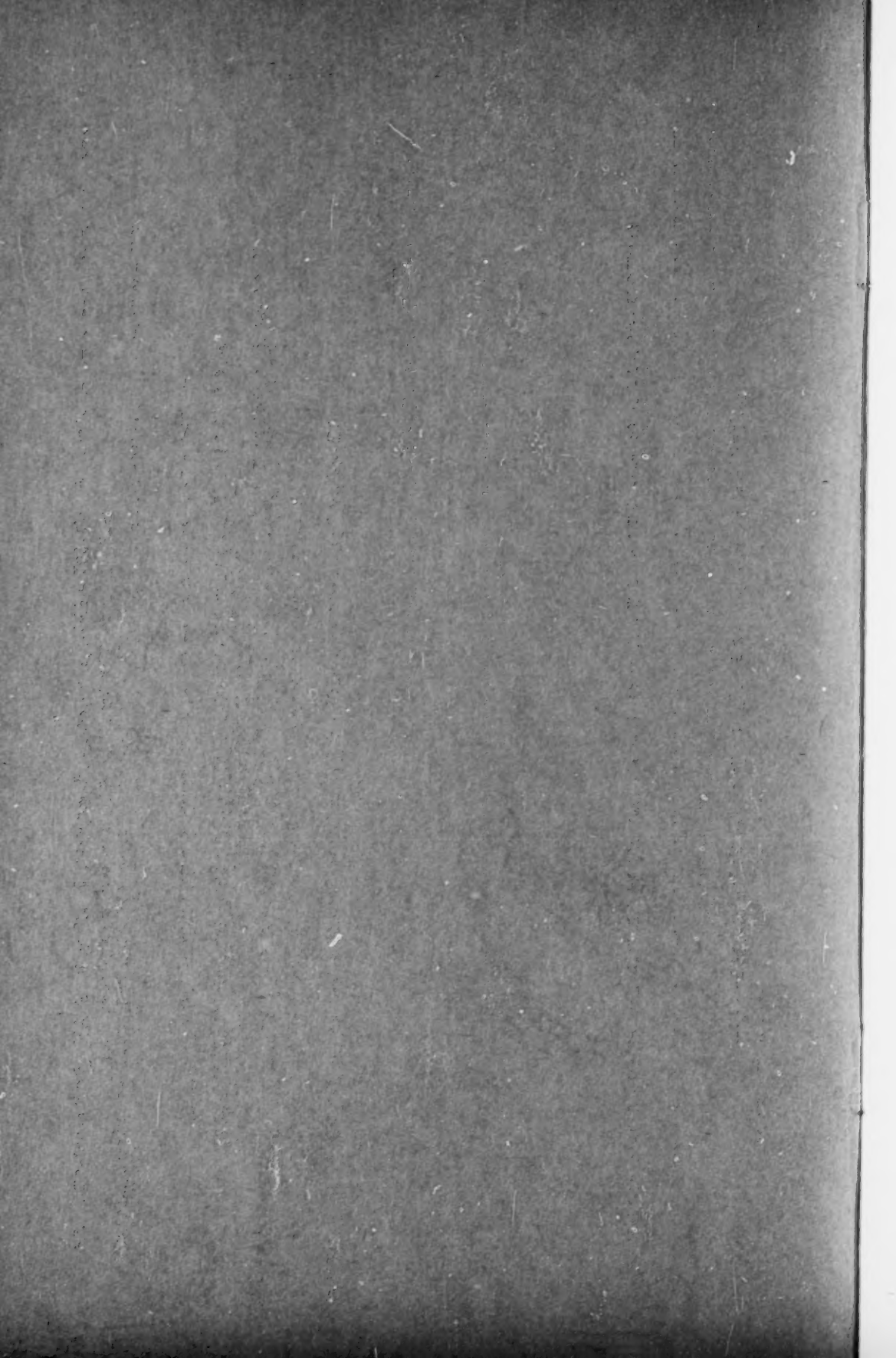
*Respondents.*

**PETITIONERS' REPLY**

**TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF RESPONDENTS ASMAN, PETERS, HILL AND STEIN AND TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF RESPONDENTS GOWSOSKI, CHUCHRAN, CARDINAL AND KENYON**

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**I.**

**PETITIONERS' REPLY TO RESPONDENTS', ASMAN, PETERS, HILL AND STEIN'S, BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI**

Petitioners object to the following eight (8) areas addressed by Respondents in their Reponse Brief.

1. On pages 9-10, Respondents set forth "Medical and Suicidal Precautions Implemented by Respondent Asman." Review of the Record below reveals that the identified "protocols" were not distributed by Respondent Asman until November 16, 1982, exactly one week after the death of Danese.<sup>1</sup> The record reveals that none of the Respondents were ever instructed to read, did read, or were ever trained in or tested on their knowledge of the identified protocols.<sup>2</sup> On March 30, 1978, Asman published five pages of Booking and Jail Procedures which required screening for suicidal tendencies.<sup>3</sup> However, the procedures were never distributed and the officers were never trained regarding identification of suicidal tendencies or suicide prevention.

2. Respondents contend that Asman's and Peters' involvement is limited to their failure to train their staff in suicide risk assessment and prevention and their failure to build a lock-up in conformity with mandatory regulations. Petitioners, however, alleged that Respondent Asman deliberately lied to the Department of Corrections<sup>4</sup> and that Asman and Peters, by failing to investigate the conduct of the officers involved in the 1977 suicide of Robert Frank or to initiate training, policies, procedures and/or disciplinary action, have condoned and/or ratified the unconstitutional acts of their officers, thereby establishing a policy of deliberate indifference to a pretrial detainee's constitutional

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<sup>1</sup> Asman Deposition testimony R 207, Plaintiff's Answer to Motion for Summary Disposition p. 729.

<sup>2</sup> Asman Deposition testimony and R 207, Plaintiff's Answers to Motion for Summary Disposition pp. 674-680.

<sup>3</sup> Reference is made to p. 22 of the Petition for Certiorari.

<sup>4</sup> Reference is made to p. 21 of the Petition for Certiorari.

right to medical attention and safe conditions of confinement.<sup>5</sup>

3. Respondents' characterization of Danese as a "manipulative inmate"<sup>6</sup> and Respondents' argument that Danese made no "unequivocal threat" to commit suicide are unfounded. The record below is devoid of any evidence or testimony, expert or otherwise, to suggest that Danese's threat was other than a sincere cry for help, a genuine threat of self-harm. It is obvious that Sgt. Hill considered Danese's threat serious, as he stated, "We better watch him."

4. Respondents suggest no less than twelve (12) times that Petitioners are seeking to have this Court establish that as early as 1982, a lay police officer was constitutionally required to "diagnose" a pretrial detainee's condition and then to "treat without request".<sup>7</sup> What Petitioners seek is this Court's determination that Respondents are not protected by qualified immunity and may be personally liable for the deliberate indifference manifested by them to Danese's constitutional right to medical attention and safe conditions of confinement.<sup>8</sup> On November 14, 1978, the Department of Corrections provided Asman with a "Receiving Screening Form and the AMA Practical Guide to Implement Medical and Health Services in Jails." Question number 9 on the Receiving Form received by Asman asks, "Does the inmate's behavior suggest the risk of suicide?" To answer the question,

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<sup>5</sup> Reference is made to p. 18, n. 23 and p. 21 of the Petition for Writ of Certiorari. R 208 Second Amended Complaint, pp. 162-167.

<sup>6</sup> Reference is made to pp. 14 and 21 of Respondent Asman's Response Brief.

<sup>7</sup> Reference is made to pp. 16 through 26 of Respondent Asman's Response Brief.

<sup>8</sup> See n. 23, Petition for Writ of Certiorari.



the booking officer must be trained. None of the Respondents were ever trained in medical intake screening for suicidal tendencies. If the Respondents had been trained they would have been told, "Answer YES if the inmate talks about killing himself, even if he just seems to be joking" or if the inmate seems very depressed or talks about not caring about things any more.<sup>9</sup> The AMA Training Manual provided Respondent in 1978 recognized that it is not the booking officer's "job to *diagnose* mental illness or emotional disturbances."<sup>10</sup> Petitioners do not seek to hold lay police officers to an impossible standard of diagnosing who will and will not commit suicide. Petitioners seek to hold the Respondents liable for their failure to medically screen Danese or render any medical care after he was cut down. Danese was not placed in a detoxification cell as required by Michigan Law and was not monitored. If the Respondents had not exhibited deliberate indifference to Danese's serious medical needs<sup>11</sup> and his right to safe conditions of confinement, Danese would be alive today.

5. Respondents' contentions that Danese was properly held in a holding cell is false. Respondents are well

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<sup>9</sup> AMA Manual for Training of Jailers In Receiving Screening and Health Education 1978, National Institute of Corrections, Bureau of Prisons, US Department of Justice Grant.

<sup>10</sup> The purpose of receiving screening is to provide some initial insight into an inmate's physical, mental or emotional condition. The officer is informed, "obviously, you cannot make a *diagnosis* of an inmate's condition during booking, but you should know the obvious things to look for in order to decide whether to answer yes or no to particular question. Remember, . . . you cannot *diagnose* the condition . . . it might be more serious than you think." Therefore, if a doubt exists the inmate should not be accepted until he is medically cleared.

<sup>11</sup> Asman admits the threat of suicide is medical emergency. *Robert v. City of Troy*, 773 F2d 720 (6th Cir. 1985). Recognized, "Indeed, suicidally inclined inmate is in need of medical attention."



aware that MCLA 791.555 mandates that Danese be housed in a detoxification cell until he could care for himself.<sup>12</sup> Respondents cannot reconcile their contention that Danese was not detoxifying and could properly care for himself with Respondent Hill's refusal to release Danese on bail until he sobered up and Hill's determination that Danese required constant visual observation.

6. In support of Petitioner's position that the Michigan Administrative Regulations were the minimum mandatory standards, Petitioner cites this Court to *Young v. The City of Ann Arbor*, 119 Mich App. 512, 326 NW2d 547, decided on September 21, 1982, which held, "... in light of our finding that the Ann Arbor facility was required to follow the Department's rules, the Trial Court erred in denying Plaintiff's request to instruct the jury on the mandatory applicability of the supervisory rules." *Id* at 550. In continuing, the Court provided, "Since we find that the Ann Arbor facility was required to follow the Department's rules, it was incumbent upon Krasny [The Chief of Police] to enforce the regulations." *Id* at 550. *Davis v. Detroit*, 149 Mich App 249, 386 NW2d 169 (1986), *lv den* 426 Mich 856 (1986); *Hickey v. MSU*, 177 Mich App 606, 443 NW2d 180 (1989); *Smith v. Yono*, 613 F. Supp. 50 (1985).

7. Respondents' reliance upon the fact that since 1977 all Michigan police officers, with limited exceptions, must be "academy trained . . . including first aid"

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<sup>12</sup> Reference is made to Appendix p. F-2, attached to Petition for Certiorari. Reference is also made to R 207, Plaintiff's Answer to Motion for Summary Judgment pp. 871-873. In the memorandum of June 20, 1980, the Department of Corrections advised Respondent Asman to place a person who threatens suicide in the detoxification cell, increase cell supervision or convey the intoxicated, suicidally-inclined detainee to a detoxification center to ensure appropriate medical care.

is unfounded. The record shows that none of the Respondents on duty on November 9, 1982, had been trained.<sup>13</sup> That Respondents knew the law of arrest is not in dispute. Respondents are being sued for not knowing the law of detention. They simply did not know what to do with Danese once they had him. Accordingly, they did nothing. Danese was denied the evaluation process, the inmate classification process, and illegally housed in a facility which was illegal for all purposes under Michigan law.

8. Respondents claim that Petitioners seek "more training or better training" is unfounded.<sup>14</sup> Critical to this discussion is the fact that the procedures of March 30, 1978, were never distributed, read or followed by any of the Respondents. Respondents, by their incarceration of Danese, had an affirmative constitutional duty to provide for his serious medical needs and provide for safe conditions of confinement. Respondents exhibited nothing but deliberate indifference toward Danese. They must not be afforded immunity.

## II.

### **PETITIONERS' REPLY TO RESPONDENTS', GOWSOSKI, CHUCHRAN, CARDINAL AND KENYON'S, BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI**

Respondents agree with Petitioners that deliberate indifference to a serious medical need of a pretrial detainee constitutes a substantive due process viola-

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<sup>13</sup> Reference is made to p. 21 of Petition for Writ of Certiorari and n.33.

<sup>14</sup> Reference is made to pp. 21-22 of the Petition for Writ of Certiorari and n.35.

tion.<sup>15</sup> In *Ky. Department of Corrections v. Thompson*,<sup>16</sup> this Court recognized that the use of "explicitly mandatory language" in connection with the establishment of "specific substantive predicates" to limit discretion create a liberty interest.<sup>17</sup> This Court's review of Appendix F attached to the Petition for Certiorari will reveal the Michigan legislature's utilization of the explicitly mandatory language, "shall." This language, taken in connection with the specific substantive predicates,<sup>18</sup> limits Respondents' discretion and creates a liberty or expectation interest in the policies, procedures or process to be utilized in

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<sup>15</sup> Respondents Gowsoski, Reply Brief, p. 16.

<sup>16</sup> 490 US \_\_\_, 104 L Ed 2d 506, 109 S Ct. \_\_ (1989)

<sup>17</sup> *Id* at 104 L Ed 2d 516-517.

<sup>18</sup> 791.5511(1):

"a facility shall comply with the requirements of the rules . . .";

791.555(1):

"A . . . lockup . . . shall have . . . electronic monitoring . . .";

791.555(1):

"A . . . lockup shall provide one or more detoxification cells";

791.555(7):

"The cell . . . shall be located near a guard station in order to insure proper supervision . . .";

791.635(2):

"Provision shall be made to provide close visual supervision for an inmate who is potentially suicidal . . .";

791.642(1):

"A facility administrator shall provide a basic plan for classifying inmates";

791.657:

"The administrator shall insure the appropriate medical screening and health care is provided to inmate."

(Emphasis added).

determining who requires medical attention, the scope of the attention and what constitutes constitutionally safe conditions of confinement on a case-by-case basis.

Because Respondents had no policies, procedures or plans to classify inmates, no medical intake screening and no training,<sup>19</sup> Danese was denied the very process [hearing/screening] mandated by law to determine the extent of his medical and personal security needs. Recognizing the Respondents' awareness<sup>20</sup> of Danese's threats, of his mental and physical condition, and Respondents refusal to implement any precautionary measures to protect suicidally inclined detainees, despite their awareness of the mandatory nature of the jail rules,<sup>21</sup> the inmate classification and medical screening requirements of the rules and the AMA, Respondents cannot be said to have exhibited anything other than deliberate indifference, gross negligence and professionally unacceptable judgment toward Danese. Accordingly, qualified immunity must be denied.

### RELIEF REQUESTED

Whether an incarcerated, intoxicated pretrial detainee who manifests suicidal ideations by threats or otherwise, has a constitutional right to be protected by his custodians from suicide is a question of national importance not previously addressed by this Court. As the resolution of this important issue will directly impact

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<sup>19</sup> See the last paragraph on p. 12 of the Petition for Writ of Certiorari.

<sup>20</sup> See the statement of the case in the Petition for Writ of Certiorari.

<sup>21</sup> Asman admitted rules were mandatory and governed the operation of his facility. R 207 Answer to Motion for Summary Judgment, pp. 749 and 765.

the operation of every jail lockup and security camp in the nation, Certiorari must be granted.

Respectfully submitted,

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Dated: March 13, 1990